NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Ave NE., Washington, DC 20002

Amtrak Management's Response to the June 18, 2009 Report Regarding Amtrak's Office of Inspector General

July 22, 2009

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A. Summary

This memorandum summarizes Amtrak management's response to the allegations set forth in the Report (the "Willkie Report") commissioned by former Amtrak Inspector General Fred Weiderhold and authored by Robert Meyer from the law firm of Willkie, Farr & Gallagher ("Willkie Farr"). In sum, the Willkie Report appears to have begun its review with the premise already established that "the policies and practices in question were 'inconsonant with the Inspector General [Act] and the standards of the IG community' and resulted in 'serious and unreasonable interference with OIG activities.'" (Page 1) Robert Meyer was asked to "examine these issues" and to "make recommendations for how to address them within Amtrak or otherwise." Id. Apparently, Mr. Meyer was not asked to examine whether the facts supported the OIG's assertions.

The Willkie Report acknowledges, at the end of a lengthy footnote, "We have not sought or received documents or information from the Board of Directors, Law Department, or any other Amtrak personnel, and we have not conducted any interviews of Amtrak directors, officers, or other personnel in connection with this report." (Page 4 fn. 7)

This admission that the Willkie Report is one-sided, incomplete, and the product of obtaining only part of the story is at odds with the sober, earnest, and reasonable tone of the Report. It is also a profound indictment of the process by which the Willkie Report was compiled and diminishes the credibility and reliability of all that it contains.

In short, the Willkie Report is simply a megaphone for the grievances articulated to Willkie Farr's lawyers by the OIG and its personnel. The Willkie Report is based solely on whatever documents the OIG provided to the Willkie Farr lawyers, and whatever additional information the OIG chose to share. The complete and accurate record of the facts, as recited in this memorandum, demonstrate the following:

- No document or information requested by the Amtrak OIG has been withheld by the Law Department or, as far as the Company is aware, any other department of the Company.
- The Law Department does not pre-screen all Amtrak information and documents before their production to the OIG.
- Only likely privileged, confidential or proprietary material is reviewed by the Law Department, and marked as such where appropriate, and then provided to the OIG, pursuant to EXEC-1.
- The Law Department does not make any determination as to what information or documents are responsive to any OIG request. The OIG has always been provided all requested materials. No requested materials have ever been redacted.
- No document has been or can be withheld by the Law Department from either the Department of Justice or Congress.

- The Amtrak OIG has full access to all stimulus fund related documents.

- Neither the Company, nor the General Counsel nor the Law Department has ever required having a Law Department attorney present for an OIG interview of an Amtrak witness or required that an Amtrak witness have legal counsel; no Law Department attorney has ever been present at an interview of an Amtrak witness.

- OIG personnel decisions are not subject to Law Department oversight; the Law Department, upon request, provides legal guidance to Human Resources and the Board Chairman on the proper application of the law and company policies.

- Nothing in the EXEC-1 Policy established by Amtrak's former Chairman of the Board, nor the protocols agreed to and signed by the General Counsel and Inspector General, infringes on the independence of the OIG or its ability to conduct investigations and audits within the scope of its authority.

The remainder of this memorandum includes the facts that were not presented or considered in the Willkie Report and demonstrates that Amtrak's policies and procedures are legal and appropriate and that the events and conclusions described in the Willkie Report are not accurate, complete or fair descriptions of the incidents in question. When the Amtrak President & CEO was advised by the Amtrak Board Chairman that the OIG believed EXEC-1 and the Protocols contradicted the Inspector General Act, the General Counsel retained outside counsel experienced in these matters to evaluate the assertion. A copy of that memorandum is provided along with this Memorandum to demonstrate not only that the terms of the policy and protocols are completely appropriate and typical of what is found in federal agencies, but, also, that the Amtrak Board Chair who in his "head of entity" capacity promulgated EXEC-1 was relying on expert counsel to work with him and Inspector General Weiderhold to identify a policy that squarely fit within the parameters of the IG Act while balancing the responsibilities of both Amtrak and its OIG and the requirement that the OIG maintain its independence from the Company. See Exhibit 1, M. Bromwich Memorandum, "Amtrak Inspector General Policy" (October 15, 2008).

B. General Comments

The Willkie Report relies on unsupported exaggerations and hyperbole even when such absolutes are not supported by the examples or source material provided. For example:

- The Law Department is characterized as a "document and information clearinghouse" for the OIG. (Page 64) This is untrue.

- The Willkie Report claims that the "OIG's personnel decisions are subject to Law Department oversight . . . ." (Page 1) This is untrue.

- It is asserted that the "Law Department at Amtrak pre-screens all Amtrak documents before production to the OIG." (Page 1) This is untrue.

- It is asserted that the LawDepartment has "redact[ed] information from documents to be produced to the OIG." (Page 1) This is untrue as far as information and documents requested by the OIG. The two supporting examples in the Report are instances where redacted Board meeting minutes were provided to the OIG. (Pages 41 and 44) The facts demonstrate that no requested material wasredacted and this production is consistent with the Company's history and practice with respect to productions of Board related material. OIG did not ask to review the material that was redacted, which was not requested by the OIG and constituted unrelated material.

- The Report states that with respect to an investigation of the Law Department's relationships with outside counsel (commenced in 2005 andstill uncompleted), the Law Department required the General Counsel to "be notified of, and approve, all document requests by the OIG to Law Department employees." (Page 6) This is not true, and the Willkie Report does not cite to any supporting evidence that the General Counsel required all requests to be "approved" by her. The truth of this is that because Eleanor Acheson became Amtrak's General Counsel after the period covered by the OIG's investigation, she was the only lawyer in theLaw Department not potentially involved in the OIG investigation and thus requested tobe the point of contact for document requests in order to coordinate the Law Department's production and response – nothing more.

- The Report also claims that the OIG soughtinterviews of Law Department employees and that the Law Department required separate counsel for all Law Department employees to be interviewed. This is not true. The OIG has had every opportunity – as is its right and our duty – to interview employees of the Law Department. Employees who choose to be represented by counsel have such a right, although several Law Department employees have agreed to be interviewed and have been interviewed without benefit of counsel.

- The Willkie Report concludes that many of Amtrak's policies and practices have "unlawfully restricted the OIG's access to information and documents," "improperly subjected the OIG to the supervision ofthe Law Department," and "undermined the objectivity of the OIG's work product because of the appearance and reality of improper external political pressures on the OIG." (Page 8) The OIG has always had full and unrestricted access to Amtrak documents. There has never been any Amtrak policy or practice that has restricted the OIG's access to any Amtrak information, regardless of its privileged nature.

- The wholly unsupported claim that the Law Department has "supervised" the OIG is not true.

- The claimed lack of objectivity attributed to the OIG as a result of the "improper external political pressures" put on the OIG is untrue– indeed, these "improper external political pressures" are never identified. There is no evidence in the Willkie Report that supports this sweeping claim.

Setting aside the unfounded conclusions contained inthe Willkie Report, there is still much left to contend with due to what has been omitted. What the reader is left with is less than half the story and a misimpression of the work that is done to comply with the OIG's requests.

1. Oversight

One overriding theme throughout the Willkie Report is that it equates "oversight" with another party having any role or involvement in OIG activities at any level. The fact is that all Inspectors General must operate within certain constraints – all anticipated by the Inspector General Act, as amended (the "IG Act") – and develop a working relationship with the entity for which they are responsible. Most do so through professiona l interaction and open communication while respecting each other's independe nt responsibilities, while others rely on written policies, protocols and practices to guide both management and OIG personne l on the sort of professional cooperation and engagement thatserves both the OIG and interest s and those of its agency, in this case the Company. The implication in theWillkie Report is that any rules – even those agreed to by an Inspector General – are improper. There is no basis in the IG Act or common practice among Inspectors General forthis assertion. This is discussed inmore detail throughout this memorandum as the OIG's relationship with the Company is a recurrent theme throughout both this and the Willkie Report.

2. OIG's Obligation to Balance Its Unquestioned Right of Access to Amtrak Documents with the Company's Privil eged and Proprietary Information

The Willkie Report claims that "Section 6 of the[IG] Act authorizes an OIG to have access, without limitation, to the internal information and records necessary to carrying out the IG's responsibilities." (Page18). In a similar vein, the Report asserts that "Congress made clear its intent that IGs have *unfettered* access to all information .. ." and that "Congress did *not* qualify the provision in any way." (Page 18) The words "without limitation" and "unfettered" have been added here; they are not in the statutory text quoted in the Willkie Report. As is discussed below, the OIG's grant of access to agency information does not include the unqualified right to breach agency privileges and shareconfidential or proprietary inform ation to the detriment of the agency's interest.

The directors and officers of the Company have a duty to protect privileged, confidential and proprietary information that belongs to the Company. The EXEC-1 policy and process appropriately execute the Board of Directors' responsibil ity to protect the corporate interests and rights of Amtrak, its board members, officers and senior management and reflects and utilizes the function and expertise of the relevant corporate officer (Amtrak's General Counsel) to execute this responsibility, asis done throughout the corporate world. It is a fundamental element of the structure of basic corporate governance. The section 5.3 policy and OIG-Law Department protocols were designe d and written to respond to thefact that Amtrak is, at the same time, a corporation under, effectively, state law with all of the rights and interests of other corporate entities and, for certain purposes, a federal entity with an OIG. Accordingly, the policy and protocols serve the interests and respect the rights of the corporation and the interests and authorities of the OIG, without jeopardy or injury to either. Specifically on the latter point,

no document or other form of information covered by any privilege or subject to any confidentiality interest has ever been withheld from the OIG or redacted in any respect.

The Willkie Report assumes that the genesis of the Company's desire to protect its privileged information was a breach of that privilege, involving documents provided to the OIG, that occurred in 2006. That assumption is incorrect, but it was an important event. The Willkie Report's discussion of the episode involving the leak of privileged information contained in the Toothman Report is truncated and inaccurate. The Willkie Report acknowledges that the Law Department considered the leak of privileged information in connection with the Toothman Report to be "damaging to Amtrak," but the Willkie Report states that the "OIG maintains that it has neither been informed about nor is aware of any specific Amtrak legal matter adversely impacted by release of the information." (Page 32)

The claim that the OIG has not been informed and is unaware of any specific Amtrak legal matter that has been adversely affected by the release is false. The OIG has been informed of potential adverse effects on Amtrak's legal interests. On November 13, 2006, former General Counsel Alicia Serfaty sent a memorandum to the IG attaching an earlier memorandum she provided to the Amtrak Board of Directors regarding the breach of Amtrak's privilege. See Exhibit 2, Memorandum from A. Serfaty to F. Weiderhold with Attached November 6, 2007 memorandum to Amtrak Board of Directors re Breach of Legal Privilege by OIG and Transportation & Infrastructure Committee (Nov. 13, 2006).

In her memorandum to the Board, Ms. Serfaty specifically noted that [redacted] See Exhibit 2, Memorandum from A. Serfaty to F. Weiderhold with Attached November 6, 2007 memorandum to Amtrak Board of Directors re Breach of Legal Privilege by OIG and Transportation & Infrastructure Committee (Nov. 13, 2006) at 1-2. At the time, the ExpressTrak litigation was still ongoing, and, although Ms. Serfaty noted that [redacted] the impact of the breach of Amtrak's privilege in that case could not be known or quantified.

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Moreover, to the extent the OIG is not aware of any negative effect this disclosure had on any Amtrak legal matters would appear to be a function of the OIG's failure to investigate the circumstances leading to the leak. Former General Counsel Serfaty requested that the IG take appropriate action, but no such investigation has been forthcoming.

To date, the OIG has provided no information to the Company regarding whether an investigation has been undertaken or the matter referred to the Integrity Committee of the PCIE/ECIE (now the Council of the Inspectors General on Integrity and Efficiency).

It is, in any event, beside the point whether the OIG has been informed of any specific legal matter that was adversely affected by the unauthorized breach of Amtrak's privilege. Even assuming that Amtrak suffered no measurable harm from this particular instance of waiver, the potential for future unauthorized waivers by the OIG or its agents continues to exist. Amtrak cannot ignore this potential threat to its legitimate corporate interests.

3. Employee's Right to Counsel

The Willkie Report asserts that the Law Department "required that separate counsel be appointed at Amtrak's expense, to represent all Law Department employees to be interviewed." (Page 6) The facts are otherwise. There is no support in the Willkie Report to suggest that all Law Department employees were even entitled to counsel. Indeed, several lawyers in the Amtrak Law Department have agreed to be interviewed by the OIG without benefit of counsel. The Willkie Report does not attempt to differentiate between those employees of the Law Department who, by reason of their status, would be *entitled* to have counsel provided pursuant to Amtrak's Bylaws and policies.

On July 29, 2008, the General Counsel sent a memorandum to all Law Department employees advising them of the OIG Investigation and indicating that the Department was fully cooperating in that investigation. See Exhibit 3, Acheson email with Attached Memo re OIG Investigation (July 29, 2008). The memorandum also states that Law Department employees are "free to speak with the OIG investigators and answer their questions" and that they also had the right to request counsel if they so choose. Nothing about that memorandum required Law Department employees to have counsel and clearly left that decision up to each individual employee. This was prompted by the OIG's behavior during investigative interviews and disputes relating to OIG reports of what witnesses said during its interviews.

4. OIG Obligation to Comply with IG Act Reporting Requirements

The Willkie Report itself discloses instances when the OIG failed to follow the requirements of the IG Act. For example, according to the Willkie Report, in late 2006, the OIG apparently reported to the House Transportation and Infrastructure Committee that the OIG was experiencing non-cooperation and/or significant hurdles from the Law Department in connection with the OIG's investigation of certain invoicing and expense charges from the law firm Manatt, Phelps & Phillips, LLP ("Manatt"). This report apparently prompted referral letters from members of Congress to the U.S. Attorney General requesting that the Department of Justice review potential "unlawful conduct" involving Amtrak's legal team and outside law firms. (Page 33) See Exhibit 4, Letter to Attorney General Gonzales (December 4, 2006).

Despite former Amtrak Board Chairman Laney's request that the OIG promptly provide him with information regarding the OIG's findings or conclusions regarding the allegations of illegal or inappropriate behavior, according to the Willkie Report, the OIG refused to provide such information on the grounds that the OIG's investigation was still ongoing. (Pages 33-34) See Exhibit 5, Laney Memorandum to Weiderhold & Peterson (January 3, 2007). Chairman Laney's request to be promptly informed of the results of the OIG's investigation was entirely appropriate and consistent with his "general supervisory" role over the OIG and the IG Act's directive that the IG "report to" and keep the Chairman "fully and currently informed." IG Act §§ 4(a)(5) & 8G(d).

The OIG's failure to bring its concerns initially to Chairman Laney, unless it had reason to believe that he was somehow implicated in the "unlawful conduct," was inconsistent with the requirement in the IG Act to keep the Chairman "fully informed." Notably, the Willkie Report

does not state that the OIG everprovided a report to Chairman Laney at the conclusion of the OIG's investigation.

Most importantly, this episode highlights the Amtrak OIG's skewed understanding of its reporting obligations under the IG Act. If the OIG was indeed experiencing non-cooperation or significant hurdles in the OIG's investigation of the Law Department, the OIG was required to notify Chairman Laney (not Congress) in the first instance if requested information was being "unreasonably refused or not provided" by the LawDepartment. IG Act § 6(b)(2). The Willkie Report does not state that Chairman Laney was ever informed by the OIG of such problems.

5. OIG Independence and its Improper Role in Managerial Matters

A recurrent theme in the Willkie Report is that Amtrak Management – particularly the Law Department – has intruded on the independence of the OIG. The Law Department operates within the authority and direction of Amtrak's President & CEO and its Board of Directors. The policies that govern the Law Department's actions were reviewed and approved by those offices. See Exhibit 6, EXEC-1 (November 5, 2007), andExhibit 7, OIG-Law Protocols (October 10, 2007) .

The IG Act and the Quality Standards thatgovern Inspectors General set high ethical and professional standards for OIGs and contemplate ongoing and engaged communication and cooperation between OIGs and their agencies to serve their respective interests. The existence of policies, protocols and practices relating to such communication and cooperation does not interfere with the independence of an OIG.

Furthermore, in pressing its claim of improper interference, the Willkie Report cites approvingly to the Comptroller General Standards for Auditor Independence. More specifically, the Willkie Report cites (Pages 20-21)the following standards:

- "[T]he audit organization and the individual auditor, must befree from personal, external, and organizational impairments to independence, and must avoid the appearance of such impairments of independence." Section 3.02.

- "Auditors and audit organizations must maintain independence so that their opinions, findings, conclusions, judgments and recommendations will be impartial and viewed as impartial by objective third parties with knowledge of the relevant information." Section 3.03.

The OIG apparently did not share with Willkie Farr the ways in which the OIG's long-standing and deep involvement into management andoperational matters violated the Comptroller General's Standards on a regular basis. Nor, to our knowledge, did any of the OIG's reports on matters in which it played a management and operational role disclose impairments of the OIG's independence, as required by Comptroller General Standard 3.04. The Willkie Report goes on at great length (see Pages 25-27) to discuss theimportance of auditor independence without any mention of the roles assumed by the OIG in management and operational matters that, in fact, significantly eroded its independence.

C. Analysis of Protocol and Events Leading Up to the Protocol and the 2007 Exec-1

At the outset, Amtrak directs the reader's attention to the October 15, 2008 Bromwich Memorandum for a narration of the drafting of EXEC-1, as former Chairman and head of entity, David Laney, Mr. Bromwich and former Inspector General Fred Weiderhold exclusively participated in that effort. See Exhibit 1, M. Bromwich Memorandum, "Amtrak Inspector General Policy" (October 15, 2008).

The Willkie Report suggests that concerns relating to the OIG's potential waiver of Amtrak's attorney-client and other privileges first came to light in 2007. (Page 5) This is not accurate.

The Protocol - and the initial suggestion for a protocol by the General Counsel in April 2007 - was not unprecedented, nor were the concerns about privilege waiver by the OIG unique to General Counsel Eleanor D. Acheson. In 1999, former General Counsel Sarah Duggin sent a memorandum to the IG regarding ways to preserve Amtrak's privilege. See Exhibit 8, Memorandum from S. Duggin to F. Weiderhold re Attorney-Client Privilege Issues (May 4, 1999).

In that memorandum, General Counsel Duggin stated that she was authorizing the disclosure of privileged information to the OIG with the understanding that, inter alia, "OIG will protect confidentiality of the information provided and ensure that no privileged or protected information will be disclosed to a third party absent specific written approval of Amtrak." The memorandum further stated that "[i]f OIG deems it necessary during the course of its work to make disclosures to a third party that may include privileged or protected information, OIG will first consult with the General Counsel about how to protect the privilege."

The Willkie Report asserts that at the May 2007 meeting among the OIG, the law firm of Fried, Frank, Harris, Shriver & Jacobson LLP and two DOJ attorneys the "DOJ attorneys told Bromwich that the OIG's position was well grounded under the statute and relevant case law and that the Law Department had an obligation to consent to Manatt's production of the requested documents to OIG."[1] (Page 35) The Willkie Report also asserts that "the DOJ attorneys maintained that the Law Department's failure to cooperate would be contrary to law." (Page 35) These statements are materially misleading and incomplete.

No one at the meeting questioned that the Law Department had an obligation to consent to Manatt's production of the subpoenaed information to the OIG.[2] Rather, the meeting was about what procedures could be put in place to ensure that Amtrak's privileged information (given the

[1] The date of the meeting was May 2, 2007. The Willkie Report suggests that the DOJ attorneys were "two senior Fraud Section attorneys." The Fraud Section is part of the Criminal Division; the two attorneys who attended were with the Civil Fraud, Commercial Litigation Branch of the Civil Division.

[2] The Willkie Report's description of the OIG's dealings with "one of Amtrak's principal outside law firms [Manatt]" inaccurately suggests that the production of responsive documents has been the source of delay in that investigation over the past two years. (Page 6) In fact, we understand that production was completed by Manatt in February 2008; a letter was supplied by counsel stating that production was complete; and the OIG never suggested that the failure to supply a formal certificate of compliance somehow rendered the production incomplete. Contrary to the suggestion of the Willkie Report, the causes of endless delays in the investigation are known only to the OIG.

nature of the information Manatt would be turning over to the OIG) could best be protected from inadvertent or unauthorized waiver.

The primary concern of the DOJ attorneys was ensuring that the OIG could provide DOJ with any evidence, whether privileged or not, of potential criminal activity without any prescreening or other notice to Amtrak's Law Department. Amtrak's outside counsel, Michael Bromwich, made it clear at the meeting that the General Counsel was not concerned about the OIG's provision of privileged information to the DOJ without Law Department notice and fully understood DOJ's rights in that regard. Rather, he explained, the concern - based on prior experience - was with the OIG's providing privileged information to Congress (based on the then recent disclosure of privileged information to a third party) without a means for the Law Department to take reasonable steps to protect Amtrak's privilege in those cases when such protection would be appropriate. On that point, the participants in the meeting had a frank and productive discussion about relevant case authorities and possible approaches to address the concerns of both sides.

The Willkie Report states that "[n]egotiations on a protocol continued with a new draft by the OIG, which incorporated the concepts discussed at the DOJ meeting." (Page 35) In fact, the meeting is where "negotiations" with the OIG ended. The OIG presented its draft protocol to Mr. Bromwich as the OIG's "proposed agreement." See Exhibit 9, E-mail from H. Peterson to M. Bromwich with Proposed MOU (Agreement) Attached (May 14, 2007). Mr. Bromwich responded two days later with some proposed revisions to that draft, but, rather than engaging in a dialogue about changes that would be acceptable to the OIG, the OIG's representatives declared in a subsequent teleconference that all of the proposed changes were "unacceptable." The OIG demanded that Mr. Bromwich redraft the proposed changes for the OIG's consideration, even though the OIG's representatives were unwilling to identify or discuss what was unacceptable about the changes which had been proposed.

The Willkie Report states that, in October 2007, Chairman Laney presented the IG with a draft protocol in which Mr. Laney had purportedly played a key role in drafting and that the IG "responded with a substitute draft," which was rejected by Laney. (Page 35) The "substitute draft" that the IG provided Laney was, in fact, the very same proposed protocol that the OIG had sent to Mr. Bromwich in May 2007.

The Willkie Report also states that, after Chairman Laney rejected the "substitute draft" from the IG, the IG responded to the version proposed by Laney with a "few proposed 'changes.'" (Page 35)

The Willkie Report fails to mention that, months before the Protocol was signed by the IG in October 2007, the Law Department had produced privileged documents and had instructed Manatt to produce privileged materials pursuant to different and arguably less "onerous" conditions than those set forth in the Protocol. Amtrak documents were produced by the Law Department in June 2007 and Manatt concluded its production by February 2008.

The Law Department provided privileged documents to the OIG with the understanding that the OIG would not disclose privileged documents outside the OIG (except to DOJ or Congress)

without prior notice tothe General Counsel. See Exhibit 10,Letter from M. Bromwich to F. Weiderhold (June 19, 2007) at 3-4. Theseprivileged documents were provided on the understanding that the OIG coulddisclose privileged documents to DOJ without any notice to the Law Department. For disclosure to Congres s, the Law Department requested prior notice "unless there are exigent circumstances," and in such cases, the OIG was requested to provide notice to the Chairman of Amtrak, but only if Congress did not object to such notice.

Finally, the Law Department fullyrecognized that the OIG, from time to time, would need to disclose privileged information to third-party experts and consultants retained by the OIG, and the Law Department simply requested that the OIG obtain a confidentialit y agreement with those third parties to ensure they would maintainthe confidentiality of such privileged information. Given that the Protocol wasmerely an agreem ent between the IG andthe General Counsel, the IG could have, but did not, contact the Genera l Counsel to see whethe r she would agree to a different protocol, includ ing a protocol that was more closely aligned with the conditions already agreed to by the Law Departme nt in the June 19, 2007 letter.

D. Alleged Instances of Interference with OIG Activities

The instances of alleged "interference" recounte d in the Willkie Report are instances where the Law Department asked the OIG to adhere to existing Amtrak policies -including the Protocol that was signed by the IG and the 2007 EXEC-1 which was negotiated by and among then Amtrak Board Chairman David Laney, Michael Bromwich – who had been engaged by Chairman Laney for this work, and Inspector General Weiderhold. Although the OIG has reversed itself and believes thosepolicies to be inconsistent with the IG Act, there is nothing illegal about the EXEC-1 and Protocol and there was nothing untoward or inappropriate about the Law Department following those policies and expecting the OIG adhere to those policies.

If the OIG wanted the policies to be rescinded or changed, the proper course of action would have been to seek those changes - not to thwart Amtrak policy or to ignore the IG's own agreement with the General Counsel. The Compa ny found itself in the untenable situation where its OIG was unilaterally choosing not to comply with a Company policy because the OIG unilaterally decided it was improper. The OIG– the entity charged with ensuring Company employees abide by its policies in order to avoid waste, fraud and abuse – is itself violating the very policy it is charged with upholding.

What follows is a description of the individual examples contained in the Willkie Report that purport to demonstrate how the EXEC-1 policy and protocols interfere with the OIG's independence. What the following descriptions demonstrate, however, is that the Willkie Report contains only a portion of the story. When the full story and allthe facts are known, it is clear that the OIG has received every document ithas requested and that there has been no interference with its independence or ability to perform its functions.

1. Claims Department Data

The Willkie Report states that, after an OIG agent requested certain documents from an associate legal counsel in the Law Department, the OIG agent "believed that thedelay in providing these documents was significant." (Page 37) The Willkie Report gives no indication of what that

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delay, if any, was or why the OIG agent believed the delay to be "significant." A timeline of what occurred demonstrates that not only was there no delay – the OIG agent's communications at the time indicate that he was satisfied with and appreciated the response.

On January 8, 2008, [redacted] an attorney in Amtrak's Law Department, met with [redacted] an OIG Investigator and an attorney, and an assistant of the Amtrak OIG. At that time, [redacted] requested the claims files for a number of individuals purportedly represented by a private sector plaintiffs' attorney in Chicago.[3] A list containing the names of nine individuals and their dates of injury was handed to [redacted] at the conclusion of the meeting.

Later that same day, [redacted] sent [redacted] an email asking for the name of a claimant in a Texas derailment whom he had referred to in their meeting. When [redacted] received no reply, he re-sent the email two days later on January 10, 2008. See Exhibit 11, Emails from [redacted] to [redacted] (January 8 and 10, 2008). By January 15, 2008, having still not received a response, [redacted] sent a third email informing [redacted] of the progress of [redacted] efforts and requesting an answer to his inquiry. See Exhibit 12, Email from [redacted] to [redacted] (January 15, 2008). On January 16, 2008, more than a week later [redacted] finally replied that he "did not recall inquiring about a Texas case" and thanked [redacted] for the update. See Exhibit 13, Email from [redacted] to [redacted] (January 16, 2008).

In the interim, working with a legal assistant, [redacted] had begun gathering the files for review. On January 10, 2008, [redacted] learned that all but one of the files were located in Chicago and the remaining file was in Los Angeles. See Exhibit 14, Email from [redacted] to [redacted] (January 10, 2008). [redacted] also learned that one of the dates of injury provided by [redacted] was incorrect. Arrangements were made to transport the files to Washington D.C. in order to conduct a review for privileged, confidential and proprietary material, prepare a log of such material, and copy the files.

On January 23, 2008, [redacted] advised [redacted] that he would be notifying the General Counsel of his pending production of the requested files. On January 25, 2008, [redacted] emailed to [redacted] a document entitled "Amtrak Office of Inspector General Request for Information or Materials Pursuant to Section 6(b)(2) of the Inspector General Act" threatening to "request action by the head of the designated federal entity" if the documents or a response were not produced by January 31, 2008. See Exhibit 15, Email from [redacted] to [redacted] (January 25, 2008). Later that day, [redacted] advised [redacted] that he intended to produce the documents, but "allowing time for copying and review of the material in accordance with the protocol agreed to by the OIG and the Law Department, a more realistic timetable for production is the week of February 4, 2008." See Exhibit 16, Email from [redacted] to [redacted] (January 25, 2008). Three days later, on January 28, 2008, [redacted] wrote "Thank you for your prompt response. As long as the documents requested are provided to the OIG on or before February 8, 2008, your time frame is acceptable. Thanks again." See Exhibit 17, Email from [redacted] to [redacted] (January 28, 2008).

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[3] "Claims files" are Law Department files created when an employee, passenger or other individual files a tort claim for damages. These files contain numerous privileged documents and are the basis of the Company's defense against such claims.

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On February 4, 2008, two boxes containing the requested files in their entirety totaling 4737 pages were hand-delivered to [redacted] office. See Exhibit 18, Email from [redacted] to [redacted] (February 4, 2008). [redacted] responded "I also thank you for your full cooperation in this matter." See Exhibit 19, Email from [redacted] to [redacted] (February 4, 2008).

Twenty-seven days passed from the time when therequest was first received until delivery. As stated above, thirteen of those days were delays attributable to the OIG. This request for claims files was the first production of documents forthat department since the adoption of the Protocols and, consequently, it took slightly longer to process than it would today; nevertheless the files were delivered ahead of schedule. During the labor-intensive file-gathering and review process, [redacted] was continually kept informed and, except for the January 23, 2008 email, communicated his appreciation andconcurrence with the timetable. Ultimately, the files were delivered ahead of schedule and [redacted] took noexception to the time in which it took or the manner in which they were produced. The report's allegation that '[redacted] believed that the delay in providing these documents was significant" is squarely contradicted by the facts.

The Willkie Report also asserts that the associate legal counsel, apparently [redacted] "refused to provide" a subsequent request for documents "unless the request was made in writing, citing the Protocol and the 2007 Exec-1." (Page 37) [redacted] never refused to provide the documents unless the request was submitted in writing. [redacted] heard nothing further from the OIG on this matter until late August, when [redacted] contacted [redacted] with a request to "follow up" with respect tothis investigation. [redacted] asked [redacted] to specify his request to writing in order to ensure clarity and avoid miscommunicatio n and potential delay. [redacted] flatly refused stating that his superiors in the OIG were of the opinion that they were not compelled to reduce their request to writing and were therefore unwilling to do so. Another representative of the Law Department, [redacted] spoke with [redacted] to try to understand why the request could not be made in writing and was told by [redacted] he could not answer that question and [redacted] would need to speak with [redacted] OIG Counsel. [redacted] attempted to speak with [redacted] but received no response.[4]

It is common - and not problematic or an infringement on the OIG's independence or access to information - for a party receiving a document request to ask for the request in writing. Written requests are used by investigative agencies to create shared and accurate understandings of what has been requested and what needs to be produced. Such written requests are standard practice; they are not an infringement on the prerogatives of an investigating entity.

Moreover, as a matter of historical practice, OIGsent requests for documents in writing. It was not until the summer of 2008 that the OIG suddenly refused to provide written requests or confirmation of its requests. Even though no additional justification is necessary for written

[4]Insteadof responding to the LawDepartment'soutreach, about a m onth later, a federalgrand jury subpoena from theU.S.Attorney for theNorthern District of Illinois (Chicago)was served on Amtrak compelling the production of certain documents in the Chicago attorney investigation matter.When [redacted] contacted the Assistant U. S. Attorney ("AUSA") named in the subpoena to ask why thesubpoena had been issued, theAUSA said that ithadbeen requested by [redacted] he same OIG attorney who had a month earlie rasked the Claims attorney for "followup". TheAUSAstated that the OIG advisedhim they required a subpoenabecause the LawDepartment wasuncooperative and they couldnot otherwiseobtain documents from the LawDepartment. Not only wereno documents denied theOIG – no specific or described documents were even asked for,just "followup."

requests, the Amtrak OIG had a history of creating confusion and misunderstandings by issuing scattershot oral requests for information. The request to put requests for documents in writing was designed to bring order to the process. Nothing in the IG Act precludes a good faith request for the OIG agent to provide a request in writing. In order to accommodate the OIG's refusal to put its requests in writing, Amtrak modified its practice so thatwhen an oral request is received, an email confirming the request is sent to theOIG agent so that both have a record of the recipient's understanding of what has beenrequested. OIG agents have occasionally acknowledged these confirmations while refusing to set forth the request in writing themselves. [5]

The Willkie Report also describes a request by OIG Agent [redacted] in June 2008 for reports from a database maintained by the Amtrak Claims Department. The request was very broad and general. The Law Department requested that the OIG confirm its request in writing by identifying exactly what information it sought from the database. See Exhibit 20, Email from [redacted] to OIG Agent [redacted] (June 30, 2008). Copies of the emails involved are attached and clearly show that the Law Department was attcmp ting to comply with the OIG's request, but was seeking confirmation of their request in writing in order to be sure everyone was clear about the scope of the request. See Exhibit 21, Email from [redacted] to [redacted] (July 1, 2008), and Exhibit 22, Email from Acheson to [redacted] (July 2, 2008). What is left out of the Willkie Report are the facts that the Law Department (Claims group) responded to the OIG's request by providing the OIG the basic report of the Claim's database for the period requested and a list of all the available fields that could be reported out of the database so that the OIG could identify further information it wanted to receive. SeeExhibit 23, Letter from [redacted] to [redacted] (July 7, 2008). Nothing more was heard from the OIG. Some time later, the General Counsel approached Inspector General Weiderhold after a Company meeting they had both attended to ask if the OIG had identified the claims files or other information it needed and Mr. Weiderhold offered that the IG was not satisfied with the fields included in the report they received and wanted further information. TheGeneral Counsel suggested that OIG staff and Claims meet, review all of the available fields; then the OIG could identify the fields it wanted and Claims would provide that data promptly. Mr. Weiderhold stated that he thought that was a good approach. The General Counsel followed upthat conversation with an e-mail to Mr. Weiderhold but nothing further has been heardfrom the OIG on this matter. See Exhibit 24, Email from Acheson to Weiderhold (July 29, 2008)

The Willkie Report also includes a footnote with a quote from Senator Grassley about top officials at the Library of Congress allegedly interfering ininvestigations by, among other things, admonishing investigators about the "tone and focus" of their investigations and also recounts that, in an e-mail, the General Counsel "characterized" an OIG agent's "tone as 'argumentative and confrontational.'" (Page 38) The obvious implication is that the General Counsel was seeking with her e-mail to interfere in the OIG's investigation by criticizing the agent's tone, but the Willkie Report does not place any of this in context.

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[5] TheWillkie Report asserts that the LawDepartment provided claims reports (or at least"similar information") to the NewYork Times pursuant to a FOIArequest but theLawDepartment required theOIG's request to be in writing before it would comply with therequest. (Pages 37-38) If this circumstance isat all relevant to thequestion ofwhether itwasreasonableof theLawDepartment to ask that theOIGput its request in writing, it is that all FOIArequests are required to be made in writing.

The full context for the "argumentative and confrontational" statement by OIG staffer [redacted] email to Claims group director, [redacted] and the full relevant text of General Counsel Acheson's response to OIG Counsel [redacted] is this: "[T]he balance of the e-mail from [redacted] to [redacted] seems unnecessarily argumentative and confrontational for reasons that are not at all clear given our commitment - and our practice - of cooperating with your office. In the time that I have been here, the Law Department has never declined to respond to the OIG and never declined to produce information to the OIG, so it is false and counterproductive to suggest that we have not been sufficiently responsive." See Exhibit 22, Email from Acheson to [redacted] (July 2, 2008).

The final example contained in the Willkie Report in this category involves a request by the OIG to interview a Law Department attorney, [redacted] on very short notice. [redacted] apprised [redacted] of the OIG's request and, as was his right under Amtrak's policies, asked to have legal counsel present with him at the interview. When told of these developments, the General Counsel's understanding was that [redacted] was, at least in part, concerned about the accurate recording of what he would say in the interview. In order to expedite the Company's indemnification process entailing the engagement of an attorney, which can take a week or two, the General Counsel suggested that an attorney from the Law Department's outside counsel provide [redacted] representation so long as there was no conflict. When the OIG investigator arrived, [redacted] explained the situation, including that Mr. Weiderhold had not notified the General Counsel of this new investigation as was provided for in EXEC-1 some ten months after its promulgation by the Chairman of the Board of Directors and head of entity for the OIG. The investigator stated that she was unaware of the EXEC-1 provisions or the protocol. In response to being told that [redacted] had requested legal representation for the interview, the OIG investigator said she would have to check with OIG [redacted] as to whether that would be permitted. [redacted] confirmed to the OIG Agent that he was prepared to be interviewed but wanted legal representation at the interview and the OIG Agent indicated they would not proceed with the interview.

Although much is made of the OIG's requests for Claims Department documents and access to witnesses, the fact is that no Amtrak document was withheld, all Amtrak employees have been made available for interviews, and all were accomplished within the OIG's timeframes.

2. **Defeased Leases**

The OIG's investigation into this matter involved privileged information. The financial advisor involved in the OIG's investigation, Babcock & Brown, had been engaged on Amtrak's behalf by outside counsel for Amtrak. Thus, an attorney-client relationship existed -- through Amtrak's outside counsel -- between Babcock & Brown and Amtrak. As noted in the Willkie Report, the General Counsel requested that counsel for Babcock & Brown provide her with copies of any potentially privileged and confidential Amtrak documents in Babcock & Brown's possession in accordance with the Protocol and EXEC-1 for review and appropriate marking prior to their production to the OIG.

The Willkie Report notes that, following the Law Department's review of those potentially privileged documents, counsel for Babcock & Brown produced the documents without any redactions to the OIG.

Absent from the Willkie Report, however, is an acknowledgement of how long that process took. In all, the process took just 9 days from when Babcock & Brown's counsel informed the OIG that it was ready to produce the documents until those documents were actually produced to the OIG following the Law Department's review.

Similarly, the Willkie Report recounts that counsel for the former CFO would not produce Amtrak documents to the OIG without the Law Department's prior review for privilege. A true accounting of these events can be found in a memorandum written by the former Inspector General and the responses it generated. See Exhibit 25, Memorandum from Weiderhold to Boardman (December 24, 2008); Exhibit 26, Email from Acheson to Boardman (December 29, 2008); Exhibit 27, Letter from [redacted] to Weiderhold (December 29, 2008); and Exhibit 28, Email from [redacted] to Boardman (January 5, 2009). Mr. Weiderhold subsequently told [redacted] "We're good" and that he had been misinformed by his investigators. The Willkie Report states that the documents were produced to the OIG, but the report does not indicate how long that process took. In fact, the Law Department's review was accomplished in a few days.

As for the documents from the Treasurer, it should be emphasized that according to the Willkie Report there were only two documents that were not initially produced to OIG by the Treasurer's counsel and that the Treasurer's counsel stated that those documents contained potentially privileged material that would need to be reviewed by the Law Department. The Law Department, however, was not aware that the Treasurer's counsel was withholding those documents and immediately notified the Treasurer's counsel to produce the documents when the OIG requested assistance in moving the production forward. See Exhibit 29, Email from Stein Counsel to [redacted] (March 30, 2009); Exhibit 30, Email from [redacted] to Stein Counsel (March 30, 2009); and Exhibit 31, Email from Weiderhold to [redacted] (March 30, 2009). As noted in the Willkie Report, those two documents were produced in their entirety to the OIG within a month of the Treasurer's counsel first informing the OIG that the documents were to be reviewed before production and within days of the Law Department being provided copies for its privilege review.

Although much is made of this review for privileged documents, the fact is that no Amtrak document was withheld and the review process added – at most – a few days to the production. All responses were accomplished within the OIG's timeframes.

3. Moynihan Station Project Manager

The complaint in this section of the Willkie Report implies that Anne Witt, the then Vice President for Strategic Initiatives, declined to provide the requested personnel action documentation and that such material would have to be provided by the Law Department. What the Report did not say was that these personnel documents were materials and resolutions considered and acted upon by Amtrak's Board of Directors and therefore were not in Ms. Witt's possession, but were instead in the possession of the General Counsel and Corporate Secretary, Eleanor D. Acheson. Ms. Witt told OIG [redacted] that she did not have the documents and

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would ask the Corporate Secretary about them. Upon learning that OIG [redacted] wanted copies of this material, Ms. Acheson called him and left him a message, as he was on vacation, that she had the material available for him to pick up at his convenience. Contrary to the Willkie Report, none of the subject matter involving the requested personnel action was redacted. The documents included minutes from a meeting of the Board of Directors. Matters completely unrelated to the requested personnel action were removed because they were confidential Board personnel actions involving different individuals and departments. This is consistent with the practice between the Law Department and the OIG for twenty years and this is the first time there has been a complaint. The OIG has access to any and all documents within Amtrak. To avoid accidental release of confidential material, the Corporate Secretary's office has regularly removed material that is non-responsive to the OIG's request. If the OIG had serious concerns about the material that was redacted, it could have inquired into what was redacted and why it was redacted.

4. Shore Line East Commuter Rail Service Audit Issue

The Willkie Report implies that the Law Department reviewed the documents the OIG requested regarding this matter and caused an undue delay in the OIG's review. To be clear, the Law Department neither sought to review nor reviewed any documents or information requested from Strategic Partnerships by the OIG or provided by Strategic Partnerships to the OIG, in connection with the Shore Line East weekend service project in the spring of 2008.

The Wilkie Farr Report summarizes OIG activities associated with an agreement between Amtrak and the Connecticut Department of Transportation under which weekend service was added to the Shore Line East service that Amtrak was providing between New Haven and New London. While the Willkie Report states that th at idea of weekend service was eventually dropped; in fact, weekend service was approved via the referenced Senior. Staff Summary 36850 on June 27, 2008, and this service was implemented in time for the July 4, 2008 weekend. See Exhibit 32, Senior Staff Summary 36850 (June 27, 2008). Weekend Shore Line East service continues to this day.

The OIG did request information regarding this agreement on June 30, 2008, shortly after the Staff Summary had been fully approved. The representative of Strategic Partnerships who was responsible for the Shore Line East agreement contacted a lawyer in the Law Department about whether the responsive materials needed to be reviewed for proprietary or confidential material by the Law Department. He was initially, and mistakenly, told yes, and the material was forwarded to the Law Department on July 15, 2008. See Exhibit 33, Email from [redacted] to [redacted] containing email of same day from [redacted] to [redacted] (July 15, 2008). A follow-up inquiry from Strategic Partnerships as to the status of the request resulted in a July 25 email from the lawyer indicating that the material did not require Law Department review. See Exhibit 34, Email from [redacted] to [redacted] (July 25, 2009) and Exhibit 35, Email from [redacted] to [redacted] (July 25, 2009). No review by the Law Department was undertaken and the requested information was provided to OIG by Strategic Partnerships on August 4, 2008. See Exhibit 36, Email from [redacted] to [redacted] (August 4, 2008). All responsive documents were provided to the OIG involving the Shore Line East weekend service and no further request was received from the OIG.

5. **Rail Sciences Investigation**

To a great extent, the complaints the Willkie Report makes with regard to this investigation are the result of the refusal by Rail Sciences Inc. ("RSI"), an expert consultant retained by the Claims group and its attorneys, and RSI's counsel to produce certain documents to the OIG on the grounds that such production would violate confidentiality agreements with other RSI customers and their refusal to allow the OIG tointerview any of its employees without counsel for the Law Department present. Neither of theseissues seems to be connected with or the result of any request, direction or advice from the Law Department. Regarding witness interviews, presumably RSI was relying on the fact that theOIG has no legal power or authority to compel witness testimony from outside vendors; the OIG's subpoena power is limited to obtaining records from outside parties. See IG Act § 6(a)(4).

As noted in the Willkie Report, Amtrak notified the OIG that it would be reviewing and marking as privileged Amtrak documents in RSI's possession that qualified for protection consistent with the EXEC-1 policy and protocols. The General Counsel did so by letterto both RSI and the OIG dated March 31, 2008. See Exhibit 37, Letter from Acheson to RSI (March 31, 2008). The RSI privileged materials were reviewed, marked and returned for production. Itis also correct that RSI subsequently sent a letter to the OIG stating that it would not provide any further information to the OIG without the Amtrak General Counsel's express consent and would not permit RSI officials to be interviewed without Amtrak legal counsel present. Amtrak's General Counsel immediately notified RSI's counsel by letter dated April 30, 2008 and the OIG that the Law Department's only role was to review and mark privileged documents and that we had done that and had no other role thatshould be "understood, construed or characterized in any way as raising any concern about or objecting to any aspect of the OIG's inquiry in this matter." See Exhibit 38, Letter from Acheson to RSI (April 30, 2008)

The Willkie Report fails to include Ms. Acheson's April 30th letter toRSI copying the OIG and setting the record straight on her prior letterand directing that RSI comply with the OIG's request for documents immediately with the appropriate privilege marks. The Willkie Report's failure to acknowledge the General Counsel's direction to RSI tocomply with the OIG's request for documents belies its implication that the Law Department was somehow assisting RSI in its efforts to limit its production. The facts demonstrate otherwise.

Although the Willkie Report recounts that the General Counsel requested that RSI's counsel provide copies of "all" documents that had been produced and would be produced to the OIG so that the Law Department could review those documents for privilege, this is an inaccurate description of the General Counsel's direction to RSI as set forth in her March 31st letter. It is clear in that letter that shewas directing RSI to provide her with copies of any Amtrak documents that may be privileged, confidential orproprietary. At no pointin that letter does it demand that RSI provide its entire production tothe Law Department prior to transmitting those documents to the OIG.

Despite the assertions of the Willkie Report, the OIG received every Amtrak document that was requested.

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Commercial Privilege

6. [redacted]

[redacted] is a manufacturer of concrete ties that has supplied Amtrak for many years. Over those years, Amtrak and [redacted] have had a series ofcontract disputes over the performance of those ties, and those disputes continue to this day. Many of the disputes could have resulted in litigation, and still may, absent a satisfactory resolution. Consequently, the Law Department has worked with several other Amtrak departments on these disputes over the years. Amtrak has met with OIG auditors and kept them up to dateon matters. Additionally, the Law Department has tried to facilitate OIG's document requests to ensure the documents were properly identified as privileged and confidential so as not to waive any rights Amtrak may have in the event of litigation. The OIG was apprised of this concern so they would be sensitized to the ongoing dispute and the possibility of litigation.

The complaint raised in the Willkie Report is that the Law Department's June 17, 2008 production was "responsive but incomplete" saying that it excluded certain inspection reports and redacted some of the documents, including minutes from a Board of Directors meeting. First, as to the inspection reports, there apparently was some confusion over the production of these, but the OIG was notified that the reports were in the possession of the Engineering Department – not the Law Department – and no oneat the OIG ever inquired as to whether the Law Department could assist inretrieving these reports or why they had not been provided. Indeed, the Law Department provided every document related to [redacted] that was in its possession. Second, regarding the redacted Board minutes, a telephone call would have confirmed that Amtrak had provided the section of the Board minutes involving [redacted] and had only withheld that portion of the minutes unrelated to [redacted] – consistent with the protocol that has been followed for decades. The OIG did not inquire as to what material was redacted or why it was redacted. All of the documents that were provided were marked – where appropriate – as privileged and confidential pursuant to the EXEC-1 policy and protocols.

7. OIG Reviews of ARRA Spending

TheWillkie Report complains about the process by which the Company intends to comply with the OIG's request for documents related to the American Recovery and Reinvestment Act ("ARRA") stimulus funds received by Amtrak. What the Willkie Report omitted is that the OIG was apprised of the steps the Company intended to take, that the Company requested that the OIG appoint a contact in order to discuss thatprocess and ensure the OIG's needs were being met, and that the OIG failed to respond until the Interim Inspector General was appointed. The first indication that the OIG had any concern about the ARRA production was when the Company received a copy of the Willkie Report.

As noted in the Willkie Report, the Amtrak has identified its Chief Financial Officer as the key executive responsible for oversight of ARRA matters. On March 13, 2009, the Inspector General sent the CFO a memorandum outlining what he acknowledged to be a substantial document request that was intended to continue for at least the two-year period in which ARRA funds would be expended. See Exhibit 39, Memo randum from F. Weiderhold to DJ Stadtler (March 13, 2009). The CFO's office is not equipped to handle such a large-scale, company-wide production and quickly asked the Law Department toassist in complying with the OIG's request. Managing Deputy General Counsel [redacted] followed up on a telephone conversation

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with an e-mail to the Inspector General onMay 6, 2009. [redacted] had discussed the Law Department's coordination of the production of the Company's responsive documents but received no further response and in his e-mail requested that the Inspector General appoint someone with whom [redacted] could meet to discuss how to accomplish such a large production. See Exhibit 40, Email from [redacted] to Weiderhold re Document Production (May 6, 2009). There was no response.

On May 11, 2009, [redacted] again wrote to theInspector General indicating that the first search for responsive emails had retrieved an extremely large volume of unresponsive materials. See Exhibit 41, Email from [redacted] to Weiderhold re Document Production (May 11, 2009). In that e-mail, [redacted] asked that someone from the OIG meet with him to review the search parameters that were used in order to reduce the volume of unresponsive emails. There was no response.

On May 19, 2009 the Law Department sent a preservation notice to allindividuals in the Company likely to have ARRA documents advising them of their responsibi lity to retain ARRA-related documents. [redacted] forwarded thatnotice to the IG on the next day to keep him apprised of the steps being taken. See Exhibit 42, Email from [redacted] to Weiderhold with Attached May 19, 2009 Retention Notice (May 20, 2009). There was no response.

The Willkie Report appears to make four complain ts about this document production: first, that the Law Department is involved in the production at all; second, that the electronic documents were being converted in such a way as to eliminate their "metadata"; third, that the Law Department was making its own decisions regardi ng the scope of the e-mails sought by the OIG and asking the OIG to narrow lhe scope of itsrequest; and finally, that the Law Department would monitor the OIG's use of the documents through its outside vendor. None of these complaints withstands scrutiny.

1. The Law Department was brought into the process because it is the only department in the Company with the experience indocument productions of this scope and duration and, thus, is best suited to respond to and manage sucha large document production. The CFO's office was initially trying to respond by assigning a secretary with one seniorexecutive providing oversight. It quickly became clear that the size of this production would overwhelm the CFO's resources and they lacked the expertise to organize thistype of production in a manner that would be complete and responsive. See Exhibit 43, Various emails Regarding ARRA production. The Law Department accomplishes these tasks daily when responding to discovery requests in litigation and has staff experts whose job is to collect responsive documents and produce them in an organized, coherent and complete manner that withstands the scrutiny of federal courts. The CFO concluded that as a practical matter, the Company would struggle to comply with its responsibilities under the ARRA and the OIG's appropriately comprehens ive request unless the task was taken on and managed by the Law Department.

2. The OIG's March 13th request for documents did not request that metadata be maintained or provided, and the OIG has never requested that metadata be main tained or provided. The OIG on March 13 requested copies of all documents and, to the extent electronic copies were provided, that they be provided in their "native application," meaning the program in which they

were created so that the data could be reviewed. Although never requested, if the OIG would like metadata for any document – or all – thatcan be provided because every original document has been ordered to be maintained. Again, this issue was not raised with the Law Department before appearing in the Willkie Report.

3. The May 11, 2009 e-mail from [redacted] tothe Inspector General reveals that the Law Department was seeking input from the OIG in order to meet the OIG's request. See Exhibit 41, Email from [redacted] to Weiderhold re Document Production (May 11, 2009). There is no indication that the Law Department was limiting the scope of the OIG's request or trying to get the OIG to limit the scope of its request or do anything more than what typically happens in this type of electronic document production. SeeExhibit 44, Project Manager Communications Outlining Process for ARRA Document Collection (Various Dates).

4. The Willkie Report suggests that the Law Department will somehow monitor the OIG's activity by producing these documents through a vendor. To the contrary, the Law Department is adopting the same techniques used in litigation discovery. The Law Department will collect all responsive documents, load them onto a vendor's secure website, and then the OIG is free to download them and use them as they see fit. Itis not expected that the OIG will use the vendor's website as an archive – unless the OIG chooses to – but will instead download the documents and then store and manipulate them as the OIG sees fit. The vendor is not monitoring the OIG's activities, although it may very well have an electronic record that the OIG did indeed download the documents that were produced much in thesame way a FedEx or UPS delivery will include a receipt that documents were delivered to the intended client.

Amtrak is expending considerable resources to ensure that each and every stimulus related document is produced to the OIG. Amtrak takesits obligations in regard to the use of these funds very seriously and has expended significant effort to be able to comply with the OIG's requests for documents in as efficient and prompt manner as possible.

8. Recent Investigation of Cyber Intrusion

The Willkie Report states that "[a]t least onecontract employee who had contact with the Law Department during the investigation was explicitly directed by the Law Department not to inform or discuss the matter with anyone from the OIG." (Page 46) This particular incident involved an Amtrak computer server that appeared to have had suspicious malware installed through access from outside the Company. The claim that the Law Department directed at least one contract employee not to inform or discuss the matter with anyone from OIG is untrue.

Contrary to Company protocol designed to respond to the potential of both criminal activity and jeopardy to the corporate interests of Amtrak, this matter was initially referred to the OIG without the required coordination with the Law Department. When the Law Department learned of this matter, it immediately retained an outside forensic expert and legal counsel to assist in the Company's investigation. Managing Deputy General Counsel [redacted] spoke with the Inspector General and apprised him of what the Law Department was doing and who had been retained. The OIG confirmed that the forensic expert was well qualified and asked that the OIG be kept apprised of their progress. [redacted] indicated that OIG would be provided with any material that was developed and that [redacted] would provide it in a manner that would

maintain the Company's privileges during the investigation. See Exhibit 45, Email from Weiderhold to Herrmann re Cyber intrusion Expert (April 9, 2008). The Law Department immediately made contact with the FBI in order to ensure the Company took no steps that might compromise the FBI investigation. The Company was soon advised by the FBI that the criminal investigation was concluded with no findings and that no further action would be taken. The Law Department concluded its investigation and provided the OIG with a copy of the Final Report issued by the forensic expert. See Exhibit 46, Letter Transmitting Expert Report to Black (December 12, 2008). The Law Department has received no requests for information from the OIG regarding this incident that were not immediately provided.

9. **Salary Adjustments for the IG and OIG Staff**

The Willkie Report states that the Human Resources and Law Departments were involved in "the IG's recent efforts to grant salary adjustments to OIG staff." (Page 48) The assertion that the General Counsel has claimed authority to oversee OIG personnel decisions is wrong and without basis in fact.

The Willkie Report ignores the terms of the 1999 Memorandum of Understanding signed by the IG and the HR Department. See Exhibit 47, OIG-Human Resources Memorandum of Understanding (June 30, 1999). Regarding pay and grade determinations, the IG specifically agreed in 1999 that the OIG "shall make pay-related decisions, provided that such determinations may be accomplished within the budget of the OIG in accordance with the general Amtrak salary guidelines and band/zone plan for positions as classified." Regarding bonus and reward programs, the IG agreed that "[a]n OIG sponsored bonus and reward program may be instituted only upon the approval of the Vice President-HR and the Chairman of the Board of Directors."

The Willkie Report asserts that the General Counsel "objected to, among other things, the IG's decision to increase the salaries of certain OIG staff" and that, "[i]n attempting to reject the salary increases, the General Counsel took the position that she is the ultimate legal authority within Amtrak regarding interpretations of the Inspector General Act and OIG's personnel authority." (Page 7)

The statement from the Willkie Report quoted above is false. The General Counsel took no position as is suggested on the salaries or salary increases of OIG personnel. The General Counsel provided requested legal advice to the Vice President of Human Resources and the Board Chairman, as is her job. As the chief legal officer of Amtrak, the General Counsel is the arbiter of legal issues facing Amtrak.[6] The Law Department became involved in the OIG personnel issues when the HR Department asked the General Counsel for legal advice regarding the proposed actions. See Exhibit 48, Email from Acheson to Green re General Counsel's Authority to Interpret Law (January 6, 2009). Thus, it was entirely appropriate for the HR Department to seek the General Counsel's advice as to whether the OIG's proposed actions comported with the law and Amtrak policy, including the 1999 MOU.

[6] This is a fundamental premise of organizational governance for federal agencies and corporate organizations alike and was recently recognized in President Bush's signing statement in connection with his signing into law of the Inspector General Reform Act of 2008.

In connection with this matter, the OIG, through an individual who is not an attorney, was pressuring Human Resources to make the salary adjustments sought by the OIG with lengthy purportedly legal memoranda. The General Counsel reminded Human Resources and the OIG of her exclusive standing to provide legal advice to the Company.

The General Counsel never claimed authority to decide personnel matters for the OIG. Instead, upon their request, she advised the HR Department and other Amtrak officers as to whether the OIG's proposed personnel actions were consistent with the IG Act, Amtrak policies, and the budgetary authority provided to the OIG by Congress. Moreover, it was the Amtrak Chairman and head of entity for the OIG who delineated the authority and lines between Amtrak Human Resources and the OIG. See Exhibit 49, Memorandum from Chairman Carper to Green and Weiderhold (March 5, 2009). As was made clear by the Chairman:

> [T]he OIG must follow company policies and procedures for any new position or vacancy in an existing position as any department would, (i) work with the Human Resources Department on a position justification and/or job description, (ii) follow Amtrak policies, rules and guidance on band, zone, salary and benefit determinations, posting of jobs, interviewing of candidates, and (iii) follow all other policies, rules and guidance for making such job offers, terms and conditions of employment, start date, etc. As is clear in the MOU, the IG retains the decision of which candidate to hire subject to Amtrak's equal employment opportunity policies and the IG may determine the precise salary within the band and zone established by the Amtrak compensation process.

10. Distribution of ARRA Funds to OIG

The Willkie Report mistakenly attributes the requirements for distributing ARRA stimulus funds to Amtrak and implies that Amtrak management was improperly withholding these funds. With respect to the ARRA and the $5 million designated for Amtrak's OIG, it is not – and never was - Amtrak's position that expenditures of such funds must be approved by Amtrak management. Amtrak ARRA funds are appropriated to the Federal Railroad Administration ("FRA") and then provided to Amtrak as a grant. FRA provides the funds to Amtrak under a Grant Agreement between FRA and Amtrak. The original Grant Agreement for ARRA funds assumed Amtrak (the grantee) would be responsible for the tracking and reporting on the entire $1.3 billion (which includes $5 million for the OIG). The OIG raised concerns about Amtrak tracking and reporting their funds, and therefore did not draw down any of the $5 million. In light of the OIG's concerns, FRA and Amtrak agreed to amend the Grant Agreement so that the designated funds can be released to Amtrak's OIG without going through Amtrak's tracking process for ARRA funds. This amendment has been executed and the OIG has recently drawn down its funds and will account for its expenditure of the funds as required by law and the Grant Agreement. See Exhibit 50, Timeline of Events Prepared by DJ Stadtler for Board of Directors and Exhibit 51, Amendment 1 to FRA Grant Agreement (July 21, 2009).

All of this was known to OIG staff and it is unclear why they chose to conflate this issue between the OIG and the FRA into a dispute with Amtrak management, which was bound by the terms of the ARRA and its Grant Agreement with the FRA.

E. Recommendations Made in the Willkie Report

1. OIG Should Be "Empowered" to Collect Documents Without Notification to or Involvement of Other Departments

This recommendation ignores the Amtrak OIG's undisputed entitlement to unrestricted access to Amtrak information and the fact that the OIG has always received all requested documents. It also appears to eliminate legitimate and essential core interests of Amtrak such as the protection of privileged, proprietary and confidential materials that parallel government agency interests such as executive privilege and security classified information. Just as federal agency materials subject to executive privilege status or security classification are identified by agency counsel before they are provided to their OIGs and arehandled subject to agency-OIG protocols designed to serve both the OIG's and theagency's interests, so should Amtrak materials which fall into the sensitive categories be identified by Company officers and directors having a fiduciary obligation to protect such materials through aprocess of identifying, marking and producing them subject to such protocols. Moreover, the Willkie Report recommendation ignores the practical realities of how documents are routinely collected and produced in order to properly respond to an OIG request.

Under current policy, the OIG is empowered to collect documents without notification or involvement with other departments. The 2007 EXEC-1 states in the strongest terms that the "OIG shall have full, free and unrestricted access to all Amtrak records, property or other materials necessary to conduct reviews, audits, inspections and investigations that are within the scope of duties of the OIG." 2007 EXEC-1 § 5.2.

The 2007 EXEC-1 also instructs that all Amtrak employees "are responsible for providing requested assistance and information to the OIG," including "cooperat[ing] fully by disclosing complete and accurate information" and "not conceal[ing] information or obstruct[ing] or mislead[ing]" the OIG. 2007 EXEC-1 § 7.1.

As a practical matter, however, there will be occasions when department heads or managers, or even other Amtrak departments, will need to be involved in responding to OIG requests for information. Coordinating such efforts is both practical and efficient.

The suggestion in the Willkie Report that blanket secrecy should be the norm for all OIG investigations or activities because of the risk of "spoliation" and "improper collaboration" by employees seems unnecessarily rigid, without acknowledging the many situations when such blanket secrecy is unwise or inappropriate. Nor, as a matter of policy and practicality, is blanket secrecy the normal practice in federal agencies. (Page 58) Very few OIG investigations involve alleged wrongdoing by Amtrak employees that would require the type of secrecy contemplated by the Willkie Report. Moreover, there are policies already firmly in place that prohibit spoliation of evidence or improper witness collaboration and other forms of obstruction. E.g., 2007 EXEC-1 §§ 7.1 & 7.2.

Far from being inappropriate, the notice to department heads and managers included in the 2007 EXEC-1 are, in fact, good and appropriate practices in most OIG investigations, ensuring coordination and efficiency.

In any event, the 2007 EXEC-1 specifically allows for those situations where the OIG "may require that the department head maintain any necessary confidentiality" or, when "in the judgment of the Inspector General, such notification would be inappropriate under the circumstances" to decide unilaterally notto provide such notice. 2007 EXEC-1 § 7.3.

2. Witnesses Should Not Be Allowed To Have Counsel Present

The Willkie Report asserts that it is "patently improper" for, among other things, Amtrak employees to have counsel present at OIG interviews where that employee's counsel has been retained and paid for by Amtrak. (Page 59) Tosupport this assertion, theWillkie Report cites as "analogous guidance" an Office of Legal Counsel ("OLC") opinion stating (according to the Willkie Report) that "a federal agency may not indemnify an employee for legal representation in connection with an inspector general investigation of possible wrongful conduct." (Page 59) This "analogous guidance" is not binding on Amtrak and directly contravenes Amtrak's bylaws, which provide for indemnification including payment of legal fees for certain employees in specified circumstances including investigations.

The Amtrak corporate bylaws provide as follows:

> The Corporation shall indemnify and hold harmless its Directors, officers, employees and designated agents to the fullest extent permitted by law and these Bylaws. An Indemnitee, as defined in Section 9.01(b), shall be entitled to indemnification and advancement of expenses under this Section unless and until there has been a specific determination, pursuant to subsection 9.01(e), that he has not acted in accordance with the standard of conduct set forth in Section 9.01(c). See Exhibit 52, Article IX, Section 9.01 Amtrak Corporate Bylaws.

More importantly, even on its own terms, the OLC opinion does not apply to Amtrak. Although the Willkie Report does not acknowledge it, the OLC opinion's conclusion that the federal agency may not "retain and compensate private lawyers to serve the employees being investigated by the Inspector General" was grounded on the fact that there was no "explicit authority" for the federal agency in that case to retain counsel for those employees. As the OLC opinion stated: "At bottom, the question of representation is one that depends upon whether there exists a fair basis for concluding that Congress has granted to your agency the authority to provide counsel to employees who become subject to the type of administrative investigations initiated by your Inspector General."

In stark contrast to the situation presented to the OLC, Amtrak's bylaws explicitly require the Company to provide counsel for certain Amtrak employees. Notably, the Willkie Report does not seek to distinguish between those witnesses identified inthe report who requested that counsel be present for their interviews and who were entitled, pursuant to Amtrak's bylaws, to such counsel at Amtrak's expense, and those witnesses who did not have this right.

In fact, all of the employees identified in the report who had outside counsel present for their OIG interviews were entitled, as a matter of Amtrak's bylaws, to have counsel provided to them by Amtrak.

The Willkie Report in a footnote seems to concede that it would be proper for Amtrak to pay for counsel for an employee "under certain limited circumstances" (Page 60 fn. 254), but the Report does not elaborate as to what those "limited circumstances" might be. The Willkie Report also posits that "serious conflicts can arise when Law Department attorneys or outside counsel purport to simultaneously represent Amtrak and Amtrak employees suspected of wrongdoing." (Page 59) It should be noted that at no time since 2005 – the period covered by the Willkie Report – has any Law Department attorney satin on an interview of an Amtrak employee without the consent of the OIG.

The mere potential for conflicts of interest is no reason to impose a blanket prohibition on having counsel retained and paid for by Amtrak represent employees who are interviewed by the OIG. Every day, thousands of private sector employees around the country are interviewed by government investigators or counsel for private litigants where the company's counsel represents both the company and the employee being interviewed. On those occasions where representational conflicts do arise between the company and the employee, those conflicts are addressed and separate counsel retained as appropriate.

3. OIG Should Decide What Is Privileged

The Willkie Report recommends that "OIG itself is capable of identifying privileged and confidential information that it collects in the course of its investigations" and, thus, "the OIG's attorneys, not the Law Department," should be "empowered" to make privilege determinations "in the context of OIG activities." (Page 60) On the face of it, this suggestion violates Amtrak's interests and rights in its privileged and confidential information and to have its chief legal officer provide the Company critical advice on those matters which is her role to do. As stated earlier, it is the exclusive role of Amtrak's General Counsel, its chief legal officer, to give legal advice to the Company; no aspect of that responsibility may be delegated to the OIG. The OIG has no institutional competence to identify Amtrak's privileged, proprietary, or confidential information. A system in which the OIG has primary responsibility for identifying and protecting Amtrak's privilege interests would vest in the OIG a pure management function that is incompatible with the OIG's mandate under the IG Act, outside its institutional competence to perform, create a conflict of function and interest and jeopardize the Company's interests..

Generally speaking, the power to waive a corporation's privilege rests with the corporate decision maker at the time the waiver determination is made, whether it is the corporation's board or its officers, and, in Amtrak's case, these powers are vested in the Board of Directors and delegated as set forth in the bylaws to officers of the Company. In light of this structure, any decision that could affect Amtrak's ability to protect its privileges can only be made hy the full Board or, to the extent there has been a delegation, the Company's officers.

On matters of privilege, as with all other matters of legal advice, it is the duty of the General Counsel to advise on legal matters and, in addition, she is best positioned to make such judgments and to protect the interests of the Corporation. If the OIG were to be charged with protecting Amtrak's privilege interests, the OIG would be operating under an inherent conflict of interest. The OIG has its own statutory interests and responsibilities and in its function is always potentially at odds with Amtrak and, at times, is actually at odds with Amtrak. For this reason as

well, the OIG is singularly ill-equipped to play the institutional role of deciding when to waive Amtrak's privilege interests.

Federal agency OIGs routinely are required to work with other departments within their respective agencies to protect sensitive material. As a point of reference, other OIGs frequently conduct investigations involving highly-classified materials. In those investigations, the decision whether to declassify certain information as part of the OIG's public reports is ultimately made by counsel to the agency that originated the information, and not by the OIG. This arrangement is fully consistent with the IG Act and in line with the PCIE/ECIE's 2003 admonition that Inspectors General "respect[] the value and ownership of privileged, confidential, or classified information received." See Exhibit 53, PCIE/ECIE, Quality Standards for Federal Offices of Inspector General (October 2003) at 6.

The rationale for not permitting OIGs to make unilateral declassification decisions is the same as the rationale for not permitting the Amtrak OIG to make decisions about waiving Amtrak's attorney-client privilege. OIGs are not the proper entities to make judgments as to whether information is privileged or otherwise confidential and, if it must be released, how that should be done outside of the Department of Justice or Congress. In these circumstances, OIGs have an institutional bias to release, rather than protect, information.

In the past, the Amtrak OIG has proven itself incapable of adequately protecting Amtrak's privilege interests. The Toothman event illustrates the problem of leaving Amtrak's privilege in the hands of the Amtrak OIG.

The Willkie Report itself recounts that "the OIG authorized Toothman to disclose to the [House Transportation and Infrastructure] Committee any information, including any privileged or confidential information, relating to 'the Amtrak/DOT OIG Joint Review report, [Toothman's] independent expert report, and the separate ongoing T&I Committee inquiry of the Amtrak Law Department, but only on the condition that Toothman 'specifically identify the information as privileged and/or confidential and notify the Committee accordingly.'" (Page 32)

There are a number of very troubling aspects to this story that highlight the OIG's inability and (in this particular instance) failure to protect Amtrak's corporate interests. First, without any authority to do so, the OIG unmistakably took it upon itself to waive Amtrak's privilege. And despite the OIG's apparent attempt to limit the scope of the waiver only to Congress, under clearly established law, a waiver of privilege as to one third party is a waiver as to all third parties, so any attempt to restrict the waiver to Congress and exclude any other "third party" was futile. In any event, this attempt to limit the disclosure of privileged information also proved to be ineffective in this case, since the privileged information was eventually leaked to the Legal Times.

Second, and more strikingly, the OIG apparently delegated responsibility for identifying and marking privileged and confidential information to the OIG's outside agent -- someone outside of Amtrak who has no personal or institutional responsibility or connection with Amtrak. Such a delegation of responsibility is without authority and inappropriate.

Exemption 5
Commercial Privilege

The release of privileged documents associated with the Toothman Report was not an isolated incident. Amtrak recently learned that the Amtrak OIG released privileged material to an outside entity without first notifying Amtrak's Law Department of its intention to do so when the OIG knew that Amtrak, through its Law Department, has been and remains deeply involved in a collateral matter regarding the [redacted] concrete ties. This entity was not the Department of Justice, Congress, or another law enforcement agency – but an Amtrak contractor with no private right to the documents. Amtrak learned of this release from the entity, which is apparently considering legal action against Amtrak based on the documents that were provided. Amtrak OIG is reported to be seeking the return of these documents to the OIG, but the damage to Amtrak's interests has been done. Had OIG staff properly executed its responsibilities to protect Amtrak's privileged material and comply with the terms of EXEC-1, OIG staff would have worked with the Law Department on the matter and it is likely that this event would not have occurred.

4. **The Chairman Should Adopt a New EXEC-1**

The Willkie Report suggests that a new EXEC-1 should be adopted. (Page 62 and Exhibit D) The new EXEC-1 recommended by the Willkie Report is a version previously drafted by the Amtrak OIG. It is not a document that was prepared by Willkie Farr. The Willkie Report suggests that the new EXEC-1 should be adopted, in part, "to align Amtrak's OIG policies with those of the Department of Justice." Other than this passing reference to DOJ policies, the Willkie Report does not identify in any way how the proposed EXEC-1 would "align" Amtrak's OIG policies with the policies of the DOJ.

There are a number of problematic and inappropriate provisions included in the EXEC-1 proposed by the OIG beyond those addressed in Sections 2 and 3 above. The OIG recommends that Amtrak policy require Amtrak employees to give sworn statements to the OIG when requested. This proposal is ill-advised for a number of reasons. Imposing this requirement raises concerns in terms of potential consequences for employees and the OIG should an Amtrak employee refuse to provide a sworn statement. The application of a penalty to Amtrak employees based on this requirement raises concerns of an increased risk of constitutional claims brought by employees under a Bivens theory, which allows individuals to bring claims for damages against Federal Government agencies for constitutional violations. See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

This is a concern for the Company, not the OIG, because any discipline required to be imposed as a penalty for failing to provide a sworn statement to the OIG would be imposed by the Company. (The OIG itself has no authority to discipline Amtrak employees.) If employees were to be disciplined for failing to comply with this provision, they may assert that the Company violated their constitutional rights under color of federal law. See Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 394 (1995) (holding, in a First Amendment case, that Amtrak is "an agency . . . of the United States for the purpose of individual rights guaranteed against the Government by the Constitution").

In addition, Amtrak's bylaws entitle Amtrak employees to broad indemnification rights, including the payment of attorneys' fees by Amtrak. A requirement that employees sign a sworn

statement could entitle them to legal counsel paid for by Amtrak to advise them on whether to sign such a statement when it has been demanded by the OIG.

The OIG would like Amtrak employees to be required - apparently in all instances - to keep "all information related to an OIG investigation strictly confidential," including keeping such information from "the employee's supervisors." The IG Act does notauthorize the OIG to prohibit an employee from speaking with anyone else. Such a prohibition raises serious concerns about employee rights. To the extentsuch a prohibition would be designed to avoid the obstruction or impairment of OIG investigations, it is framed toobroadly. It should properly be limited to discussions with others who the employee believes - or is told by the OIG - to be a likely witness during the investigation. Maintaining strict confidentiality of OIG activities is an appropriate limitation in some cases, but only where there is some legitimate basis for concern that such notification would impair or impede theinvestigation. In short, that prohibition should be the exception, not the rule.

Blanket confidentiality for OIG investigations is not the norm within the IG community and should not be the norm for Amtrak. In fact, professional standards for OIGs strongly suggest that OIGs should engage with management and inform management of their activities. Specifically: "The OIG should make a special andcontinuing effort to keep program managers and their key staff informed, if appropriate, about the purpose, nature, and content of OIG activity associated with the manager's programs. These efforts may include periodic briefings as well as interim reports and correspondence." See Exhibit 53, PCIE/ECIE, Quality Standards for Federal Offices of Inspector General (Oct. 2003) at 30.

5. The Chairman Should Issue a New Directive To Amtrak Employees

The Willkie Report recommends that the Chairman issue a "directive" to all Amtrak employees along with a new EXEC-1 policy to "highlight[]" that OIG requests should no longer be "routed through" the Law Department. (Page 62) The premise for recommending this directive is false. It simply is not true that "so many Amtrak departments and employees now operate under the requirement that OIG requests be routedthrough the Law Department." (Page 62)

The proposed items to be included in the directive recommended by the Willkie Report are either redundant of provisions already included in EXEC-1 or should be rejected as ill-advised. The 2007 EXEC-1 already includes statements regarding the importance and role of the OIG within Amtrak, and it requires Amtrak employees to respond promptly and completely to OIG requests. The proposed blanket secrecy thatthe directive would impose on Amtrak employees regarding OIG requests are unwarranted for the same reasons thatapply to the similar provisions in the EXEC-1 recommended by the Willkie Report.

Finally, including an "assurance" in the directive that the OIG would coordinate with the Chairman before the release of privileged or confidential information in OIG "reports" does nothing to ensure Amtrak's privilege will be protected (the "directive" would not be "policy"), nor would the proposed solution address the practical problem of how to ensure Amtrak's privileges are, in fact, appropriately identified andprotected throughout the course of an OIG investigation or audit. To the extent that this is another attempt to recommend that the OIG take

on the duties and responsibilities of Amtrak's chief legal officer to identify and protect the Company's privileged and confidential informati on, it is objectionable for the reasons discussed in Section 3 above.

6. The Protocol Between the IG and the General Counsel Should Be Rescinded

The Willkie Report recommends that the Protocol be rescinded because it "restricts the ability of the OIG to conduct investigations and make disclosures as maybe required under the IG Act or requested by Congress." (Page 63) Thisrecommendation is apparently founded on several perceived problems with the Protocol.

First, the Willkie Report claims that paragraph 3 of the Protocol would "prohibit the OIG from gathering information (whether or not privilege d or confidential) from one Amtrak vendor and then, without prior Law Depart ment notification, asking questi ons of another Amtrak vendor using information learned from the first." (Page63) This claim is meritless -- there is no basis for reading the Protocol to prohibit the OIG from asking a vendor questions based on information the OIG gathered from another vendor. The Protocol is concerned with the unauthorized disclosure of privile ged and other sensitive Amtrak information outside of Amtrak.

Second, the Willkie Report claims that the Protoc ol "would also permit the Law Department to redact or limit disclosure of reports to third parties other than the Department of Justice." (Page 63) With or without the Protoc ol, the Law Department has never claimed the authority to redact information being transmitted by the OIG to Congress (or other third party), so this suggestion is baseless. In any event, theProtocol does not authorize the Law Department to redact information. Rather, the Protocol states thatnotice to the Law Department should be made to "afford the Law Department reasonable opportunity to" identify privileged information and then "take appropriate action to restrict orlimit disclosure of such information."

Consistent with the Law Department's practices inthe past (especially with regard to disclosures to Congress), the range of options available for"appropriate action" to protect confidentiality includes discussing the matter with the requesting party in Congr ess, making arrangements with Congress to maintain confidentiality, seeking a reasonable accommodation with the OIG regarding the disclosure, and seeking to obtain aconfidentiality agreement with the third party, among other options.

TheWillkie Report states elsewhere that the Protocol "restricts the OIG in the future from engaging and sharing Amtrak information to third-party consultants." (Page 36)
This reading of the Protocol is unnecessarily narrow and certainly is not a construction of the Protocol asserted at any timeby the Law Department. Had the OIG ever communicated this concern to the Law Department, the General Counse l would have agreed that third-party experts or consultants engaged hy the OIG in carrying outits mission clearly fall within the scope of "the OIG" for purposes of access to Amtrak's privileged information within "the OIG."

To the extent the OIG believes that a fair reading of the Protocol would prohibit sharing information with third parties, this perceived problem could easily have been addressed by the OIG. To date, however, the OIGhas not contacted the General Couns el to seek a revision to the Protocol to address this concern.

The failure to seek a modification to the Protocol - or to confirm that General Counsel and the OIG both did not read the Protocol to impose such a restriction - is all the more surprising since the Law Department had previously specifically recognized the OIG's legitimate need to engage third-party experts or consultants and, from time to time, share privileged information with those experts or consultants. See Exhibit 10, Letter from M. Bromwich to F. Weiderhold (June 19, 2007) at 4 (requesting on behalf of the Law Department that, should the OIG engage third party consultants or experts, the OIG obtain confidentiality agreements to protect the confidentiality of privileged material).

Contrary to the Willkie Report's suggestions, the current Protocol ensures that the OIG has access to all Amtrak information regardless of its privileged or confidential nature, while at the same time ensuring that the Law Department, which has the institutional responsibility to protect those privileges for Amtrak, can do so.

This arrangement is fully consistent with the IG Act and in line with the PCIE/ECIE's 2003 admonition that Inspectors General "respect [] the value and ownership of privileged, confidential, or classified information received." See Exhibit 53, PCIE/ECIE, Quality Standards for Federal Offices of Inspector General (October 2003) at 6.

7. **The Chairman Should Schedule Regular Meetings with the IG**

This recommendation seems at odds with the OIG's proposed rewrite of the EXEC-1 policy which removes the Inspector General's reporting obligation – the same obligations that are required by the IG Act – from the EXEC-1 policy.

While the Willkie Report asserts that the OIG must "be free of supervision from and entanglements with the management and operations of the entity that it oversees" (Page 3) and focus solely on the critical features of OIG independence and objectivity, the Willkie Report ignores the IG Act's requirement that the OIG keep the head of the establishment, as well as Congress, "fully and currently informed" about serious problems at Amtrak. IG Act §4(a)(5).

8. **"Seven-Day Letter"/Reports to Congress**

The Willkie Report recommends that the Inspector General report the issues identified in the report in "either its next-filed semiannual report or in a 'seven-day letter.'" (Page 2 and 64) This invocation of the "seven-day letter" misconceives the role and function of that seldom-used tool by ignoring the vital role played by the Amtrak head of entity (Board Chairman) in this process.

Section 5(d) of the IG Act provides that the IG "shall report immediately to the head of the establishment involved whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment." Thus, the seven-day letter is designed to alert the head of the entity, in this case the Chairman of Amtrak, to "serious or flagrant problems, abuses, or deficiencies." It would then be the Chairman's responsibility to "transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with

a report by the head of the establishment containing any comments such head deems appropriate."

This structure was designed to alert the Chairman of Amtrak, prior to notification to Congress, of such problems. This is a tool rarely used in the IG community because the structure of the IG Act is designed to promote, indeed ensure cooperation and collaboration between the heads of the organizations and the OIG. Such cooperation and collaboration are impossible when the OIG fails to keep the Chairman of Amtrak fully and timely informed of its issues or concerns.

The Willkie Report asserts that the 2007 EXEC-1 and the Protocol "would presumably prohibit any reporting of Amtrak information to Congress other than in a semiannual report or seven-day letter . . . ." (Page 51) In fact, the limitation, as acknowledged in other parts of the Report, applies solely to Amtrak information that is confidential, classified, proprietary, or privileged and would not prohibit reporting of such information but is designed to deal with "how".

The Willkie Report refers to the requirement to report such problems in the first instance to, in the case of Amtrak, the Chairman, but the emphasis remains on transmitting the information to Congress rather than providing notice of the alleged serious or urgent problems to the Chairman. (Page 14) As a point of information, the DOJ OIG has never, in its 20 years of existence, issued a seven-day letter. Issuance of seven day letters, which the Willkie Report fails to acknowledge, is an extraordinary remedy and therefore very rare.

F. Conclusion

It is clear that the relationship between Amtrak and the Amtrak OIG is not as good as either would hope. The Company has answered the allegations asserted in the Willkie Report and is taking steps to rebuild a working and cooperative relationship as soon as possible. See Exhibit 54, Board Resolution re OIG Search Committee and Task Force (July 8, 2009).